

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 PAUL SCOTT KLEIN,
4 Plaintiff

5 v.

6 MICHAEL FLAMM, et al.,
7 Defendant.
8

Case No.: 3:23-CV-00337-ART-CSD

**Order Denying Plaintiff's Motions to
Remove Magistrate Judge**

Re: ECF Nos. 36, 37

9 Before the court are Plaintiff's two motions to "remove" the undersigned as the magistrate
10 judge from the assigned case. (ECF Nos. 36, 37.) Defendant filed a response (ECF No. 38), and
11 Plaintiff did not file a reply.

12 Plaintiff argues the magistrate judge should be removed from the case based on the Case
13 Management Conference on September 17, 2024, in which the court went over the discovery plan
14 and scheduling order. The court interprets Plaintiff's motions to remove as motions to recuse.

15 In evaluating whether recusal is proper, "[w]e begin with the general proposition that, in
16 the absence of a legitimate reason to recuse himself, 'a judge should participate in cases assigned.'" *U.S. v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008) (quoting *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985); *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000)). This proposition "is
17 reflected in our oath, by which we have obligated ourselves to 'faithfully and impartially discharge
18 and perform [our] duties' and to 'administer justice without respect to persons, and do equal right
19 to the poor and to the rich.'" *Id.* (citing 28 U.S.C. § 453).

20 Federal judges are, however, required to disqualify themselves if their impartiality might
21 reasonably be questioned, or if they have a personal bias or prejudice for or against a party.
22
23

1 *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1045 (9th Cir. 1987) (citations omitted). There are two
2 federal statutes addressing the standards for recusal: 28 U.S.C. § 144 and § 455. Under either
3 statute, the substantive test for bias or prejudice is identical, but the procedural requirements of the
4 two sections are different. *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980).

5 Under 28 U.S.C. § 144:

6 Whenever a party to any proceeding in a district court makes and
7 files a timely and sufficient affidavit that the judge before whom
8 the matter is pending has a personal bias or prejudice either against
9 him or in favor of any adverse party, such judge shall proceed no
10 further therein, but another judge shall be assigned to hear such
11 proceeding.

12 The legal sufficiency of a motion for recusal is determined by the judge against whom
13 recusal is sought. *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978). “Only after the
14 legal sufficiency of the affidavit is determined does it become the duty of the judge to ‘proceed no
15 further’ in the case.” *Id.* (citations omitted). The affidavit must state facts and reasons which tend
16 to show personal bias and prejudice and “must give support to the charge of a bent of mind that
17 may prevent or impede impartiality of judgment.” *Berger v. United States*, 255 U.S. 22, 33 (1921).
18 The facts alleged must be “sufficient to convince a reasonable man” of the judge’s actual bias or
19 prejudice. *Curry v. Jensen*, 523 F.2d 387, 388 (9th Cir. 1975).

20 Here, Plaintiff did not submit an affidavit of bias or prejudice. Therefore, since there is no
21 affidavit, denial of his motions under 28 U.S.C. § 144 is proper on this basis alone. In addition, as
22 will be discussed further below, Plaintiff has not set forth facts sufficient to demonstrate actual
23 bias or prejudice.

Under § 455, “recusal is appropriate where ‘a reasonable person with knowledge of all the
facts would conclude that the judge’s impartiality might reasonably be questioned.’” *Yagman v.*
Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993) (quoting *In re Yagman*, 796 F.2d 1165, 1179 (9th

1 Cir. 1986)). Impartiality must be “evaluated on an *objective* basis, so that what matters is not the
2 reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540, 548 (1994).

3 “The ‘reasonable person’ is not someone who is ‘hypersensitive or unduly suspicious,’ but
4 rather is a ‘well-informed, thoughtful observer.’” *Holland*, 519 F.3d at 913 (quoting *In re Mason*,
5 916 F.2d 384, 386). “The reasonable third-party observer is not a ‘partly informed man-in-the-
6 street,’ but rather someone who ‘understand[s] all the relevant facts’ and has examined the record
7 and law.” *Id.* at 914 (quoting *LoCascio v. United States*, 473 F.3d 493, 496 (2d Cir. 2007)).

8 The objective standard “‘must not be so broadly construed that it becomes, in effect,
9 presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal
10 bias or prejudice.’” *Id.* at 913 (quoting *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993)).
11 Matters that are not ordinarily sufficient to require a § 455(a) recusal include: “[r]umor,
12 speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters.”
13 *Clemens v. U.S. Dist. Ct.*, 428 F.3d 1175, 1179 (9th Cir. 2005). “Disqualification under § 455(a)
14 is necessarily fact driven and may turn on subtleties in the particular case.” *Holland*, 519 F.3d at
15 913.

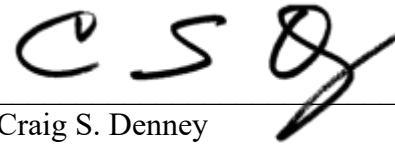
16 Plaintiff’s alleged grounds for removal are that the magistrate judge discussed the issue of
17 exhaustion of administrative remedies at the Case Management Conference (CMC). The
18 magistrate judge directed the parties to address this issue in their case management reports that
19 were to be filed prior to the CMC. Plaintiff did not submit a case management report, and
20 Defendants’ report raised the issue of a “viable exhaustion argument in this case.” (ECF No. 33,
21 p.4). There was nothing improper or unusual for the magistrate judge to discuss issues raised in
22 the case management report (such as discovery, experts, and dispositive motions like exhaustion)
23 at the CMC with relation to issuing the discovery plan and scheduling order. Plaintiff’s allegation

1 that this was improper based on his suspicion or speculation does not constitute a basis for recusal
2 in this case. *Clemens*, 428 F.3d at 1179.

3 For the above reasons, Plaintiff's motions for removal (or recusal) of the magistrate judge
4 (ECF Nos. 36, 37) are **DENIED**.

5 **IT IS SO ORDERED.**

6 Dated: February 10, 2025

7 
8

Craig S. Denney
United States Magistrate Judge